STATE OF MICHIGAN
SUPREME COURT

STEPHEN W. WARDA,

Plaintiff-Appellee/~~Cross-Appellant~~, GK

v.

CITY COUNCIL OF THE CITY OF FLUSHING and CITY OF FLUSHING,

Defendants-Appellants/~~Cross-Appellees~~.

/

SUPREME COURT NO._____

COURT OF APPEALS NO. 241188 Opn 12/23/03

GENESEE COUNTY CIRCUIT COURT
CASE NO. 98-62796-CZ

J. Corden

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Defendants seek leave to appeal from an unpublished opinion of the Michigan Court of Appeals dated June 19, 2003 and an Order denying their Motion for Rehearing dated December 23, 2003. The decision of the Court of Appeals affirmed a Trial Court decision entered November 5, 2001, awarding Plaintiff attorney fees in the amount of $109,200.00.

Defendants ask that this Court reverse the decision of the Court of Appeals and the Trial Court.

STATEMENT OF ISSUES PRESENTED

I. **WHETHER THE TRIAL COURT AND THE COURT OF APPEALS - CONTRARY TO THE PLAIN LANGUAGE OF MCL 691.1408 – APPLIED AN "EMERGENCY" EXCEPTION?**

PLAINTIFF WOULD ARGUE "NO."

THE TRIAL COURT CONCLUDED "NO."

THE COURT OF APPEALS CONCLUDED "NO."

DEFENDANTS WOULD ARGUE "YES."

II. **WHETHER THE TRIAL COURT AND COURT OF APPEALS ERRED IN FINDING THAT THE CITY OF FLUSHING ABUSED ITS DISCRETION CONTRARY TO MICHIGAN CASE LAW?**

PLAINTIFF WOULD ARGUE "NO."

THE TRIAL COURT CONCLUDED "NO."

THE COURT OF APPEALS CONCLUDED "NO."

DEFENDANTS WOULD ARGUE "YES."

III. **WHETHER THE TRIAL COURT AND COURT OF APPEALS WERE INCORRECT WHEN THEY FOUND THAT PLAINTIFF CONDUCTED THE MARCH 2, 1992 SALVAGE VEHICLE INSPECTION WHILE IN THE COURSE OF HIS EMPLOYMENT WITH DEFENDANTS?**

PLAINTIFF WOULD ARGUE "NO."

THE TRIAL COURT CONCLUDED "NO."

THE COURT OF APPEALS CONCLUDED "NO."

DEFENDANTS WOULD ARGUE "YES."

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STATEMENT OF FACTS

The Plaintiff in this case is a former police officer with the City of Flushing. (TT Vol. I, p. 41) In 1994, Plaintiff was charged in Macomb County with the felony of having made a false certification of a salvaged vehicle. Plaintiff stood accused of declaring disabled vehicles roadworthy when, in fact, they were not and of certifying that repairs were made and necessary safety equipment installed when in fact they had not. (TT Vol. II, p. 33) These charges arose from two vehicle inspections performed on March 2, 1994; the vehicle owners plead guilty to insurance fraud. In 1997, a Macomb County jury acquitted Defendant/Appellee of conducting improper and fraudulent salvage vehicle inspections. (TT Vol. I, p. 126) In the present lawsuit, brought pursuant to MCL 691.1408(2), Plaintiff demanded that the City pay his attorney fees in excess of $205,000.00, generated by his four attorneys in the criminal case, claiming he was an employee of the City at the time of these inspections. (TT Vol. I, p. 4, 72 & 74)

The Plaintiff performed salvaged vehicle inspections for the Michigan Secretary of State, which gave Plaintiff the only training in these inspections he ever received. A salvage vehicle inspector is required to be a police officer, so that he may work under the auspices of the Secretary of State, to perform the required inspections before a salvaged vehicle can be re-titled and registered for road use. (TT Vol. I, p. 8, 18, 53-56) The inspector is paid $25.00 by the applicant. In this case, the Plaintiff/Appellee inspector turned the money over to the City to withhold taxes and remit the balance to the Plaintiff for his own convenience. (TT Vol. I, p. 67) As a salvage vehicle inspector, they work for the Secretary of State and not as an employee of the municipality for which they are an officer. (TT, Vol. II, p. 18, 19) In fact, the City retains no benefit from this service and it is considered a separate job for the officers. (TT Vol. II, p. 37)

Even Plaintiff used the word "moonlighting" to describe his job as a salvage vehicle inspector. (TT Vol. I, p. 89)

Plaintiff performed hundreds of these inspections over a two-year period, outside of the City of Flushing. (TT Vol. I, p. 67, 84) While doing these inspections, the Plaintiff drove his own personal vehicle and claimed mileage as a deduction on his personal income taxes. (TT Vol. I, p. 89) The inspections were done on off duty time and the Plaintiff was not in uniform, nor accompanied by any supervisor from the City of Flushing. (TT Vol. I, p. 89) The City did not retain any portion of the $25.00 fee, nor did any portion of that fee supplement the Plaintiff's pension or deferred compensation benefits offered by the City. (TT Vol. II, p. 79) The Plaintiff was not authorized to use City letterhead, envelopes, business cards or any other resources as part of these inspections. (TT Vol. II, p. 22)

During the investigation regard criminal charges against him, Plaintiff told the Michigan State Police detectives that he had "made a mistake" and believed the applicant was going to make the necessary repairs to the vehicle. (TT Vol. I, p. 106) After learning of Plaintiff's indiscretion, the City discharged Plaintiff on May 25, 1994, for violations of department rules and regulations including but not limited to certain misconduct and lying to a superior officer. (TT Vol. II, p. 28-29)

Some three years after he was charged, Plaintiff first demanded reimbursement for his attorney fees on June 9, 1997, after he was found not guilty. In that first and only demand, Plaintiff requested $205,000.00 for the legal fees. (TT Vol. II, p. 71) After an extensive investigation, the City's attorney presented the City Council with two Resolutions, one which granted Plaintiff's demand for various reasons and the other which denied Plaintiff's demand for the attorney fees. (TT Vol. II, p. 75-77) The City Council debated these two Resolutions at a

public meeting in which Plaintiff's attorney was allowed to speak in support of Plaintiff's demand. (TT Vol. II, p. 74-75)

On September 8, 1997, the City Council voted unanimously to reject the Plaintiff's demand for attorney fees citing several factors. (TT Vol. II, p. 71, 76); See Trial Exhibit 15, attached as Exhibit A. The City Council's decision was reaffirmed on June 8, 1998, after being asked to reconsider its earlier opinion of September 8, 1997. (TT Vol. II, p. 76) After much reflection and debate, the basis for its thought out decision is reflected in Trial Exhibit 18, attached as Exhibit B, all of which was supported by the facts.

At trial, Plaintiff produced three retainer agreements, all purportedly signed and dated in 1997, nearly three years after Plaintiff's criminal case had begun and Plaintiff' attorney began generating fees. (TT Vol. I, p. 138) One agreement was dated May 30, 1997, for $100,000.00. (Trial Exhibit 22) A second agreement, signed on the same day, was for $195,000.00, and the third agreement was dated June 6, 1997, in the amount of $205,000.00. (Trial Exhibit 23, 24) At trial, neither of the two attorneys who negotiated these agreements could recall the circumstances under which they were negotiated and signed. (TT Vol. I, p. 138, 151-157) In fact, one of those attorneys, Thomas Donnellan, testified that the two agreements dated the same day at a difference of $95,000.00 made absolutely no sense. (TT Vol. I, p. 195)

Despite these facts which were presented throughout the non-jury trial, the Trial Judge, visiting Circuit Judge, James T. Cordon, on November 5, 2001, concluded that the decision by the Flushing City Council to deny Plaintiff's attorney fees was an abuse of discretion and that Plaintiff was entitled to reasonable attorney fees. (Opinion, p. 7, attached as Exhibit C) Judge Cordon opined that Plaintiff's claim of $205,000.00 was excessive and determined that a more reasonable attorney fee in this case was $109,200.00. (Exhibit C, p. 7)

In finding an abuse of discretion, Judge Cordon relied on the "emergency doctrine" set forth in ***Exeter Twp Clerk v. Twp Board,*** 108 Mich. App. 262 (1981) and ***Bowens v. City of Pontiac***, 165 Mich. App. 416 (1988) which analyzed MCL 691.1408(2). He didn't analyze the basis for the City's decision that is set out in Exhibit B. The unambiguous statute, that is the subject of this lawsuit, MCL 691.1408(2), attached hereto as Exhibit D, is absent any language suggesting an "emergency doctrine" to be applied. In a Motion for Reconsideration filed on April 16, 2002, the Honorable Robert M. Ransom ordered, without analysis, that the Motion be denied, finding no palpable error that would cause the Court or parties to be mislead.

The decision of the Trial Court was appealed on the grounds that the statute in question is discretionary, the City properly determined that the Plaintiff was not acting as an employee at the time of the inspection, and the City Council did not abuse its discretion by denying Plaintiff attorney's fees.

The Court of Appeals, in a per curiam Opinion, Judges O'Connell and Wilder, affirmed the Trial Court. In doing so, it relied on the "emergency/necessity" doctrine created in ***Exeter*** and ***Bowens***, *supra* stating that when the Plaintiff exercised his official duties in good faith the City abused its discretion when it refused to reimburse Plaintiff. Judge Jansen dissented finding that, the vehicle inspections were not within his course of employment as a police officer and the Trial Court's Ruling was clearly erroneous. (See Opinion attached as Exhibit E)

ARGUMENT

I. THE TRIAL COURT AND THE COURT OF APPEALS - CONTRARY TO THE PLAIN LANGUAGE OF MCL 691.1408 – APPLIED AN "EMERGENCY" EXCEPTION

A. Standard of Review

Questions of statutory interpretation are reviewed de novo. ***Gladych v. New Family Homes, Inc.***, 468 Mich. 594, 597 (2003).

B. Statutory Interpretation

This Appeal involves the statutory interpretation of MCL 691.1408(2). That statute reads as follows:

> (2) "When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency **may** pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. An officer or employee who has incurred legal expenses after December 31, 1975 for conduct prescribed in this subsection may obtain reimbursement for those expenses under this subsection." (emphasis added)
>
> (3) "This section shall not impose any liability on a governmental agency."

In their respective written opinions, the Trial Court and Court of Appeals relied on language created by the Court of Appeals in ***Exeter Twp Clerk v. Twp Board***, 108 Mich. App. 262 (1981) and ***Bowens v. City of Pontiac***, 165 Mich. App. 416 (1988), interpreting MCL 691.1408(2). Specifically, in those cases, the Court of Appeals has stated that:

> "When it is factually demonstrated that pressing necessity or emergency conditions warrant a municipal official in employing legal counsel in a matter of official, public concern and legal services are provided without the consent of the governing body, the Courts **may** hold a municipal

> corporation liable for such legal expenses." (emphasis added) ***Exeter*** at 270 and ***Bowens*** at 419.

The Michigan Supreme Court has addressed the issue of statutory interpretation in several recent opinions. From those opinions, it is clear that "when faced with questions of statutory interpretation, the Court's obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute." ***Pohutsky v. City of Allen Park***, 465 Mich. 675, 683 (2002). Where the language of the statute is unambiguous, the Court is to "presume that the Legislature intended the meaning clearly expressed and no further judicial construction is required or permitted, and the statute must be enforced as written. ***DiBenedetto v. West Shore Hospital***, 461 Mich. 394, 402 (2000); citing ***Tryc v. Michigan Veteran's Facility***, 451 Mich. 129, 135 (1996).

> "One fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. Thus, when the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is to apply the terms of the statute to the circumstances in a particular case." ***Massey v. Mandell***, 462 Mich. 375, 380 (2000).

Since the Legislature did not create a necessity/emergency exception, it is clear that their intention is that no such exception exists.

A plain reading of the statute can easily show the absence of any language suggesting a "necessity" or "emergency" provision whereby the Courts could hold a municipal corporation liable for legal services, as suggested by the lower courts. Instead, the statute clearly makes the decision to reimburse an "employee" a discretionary one. By using the word "**may**" and <u>not</u> "**shall**" the Legislature has left the decision of whether or not to reimburse an employee up to the governmental agency. According to the lower courts, the mere fact that one is being prosecuted is enough to create an "emergency" or "necessity"; an employee charged with a crime would

automatically have an emergency and the discretionary nature of the statute would be destroyed. How can the Council abuse its discretion when discretion is taken away?

There is a judicial history regarding a municipality's discretion paying attorney fees. See ***Messmore v. Kracht***, 172 Mich. 120, 122 (1912). "It is within the discretionary power of a municipality to indemnify one of its officers against liability incurred by reason of any act done by him upon the bonified discharge of his official duties." In ***Sonnerberg v. Farmington Township***, 39 Mich. App. 446, 449 (1972), the Court stated: "We hold that a municipality has the discretionary authority to indemnify a police officer for the expenses he has sustained in the successful defense to criminal or civil charges which arose out of and in the scope and course of his employment for the municipality." Following this judicial history, this Legislation was enacted. In ***Exeter***, *supra* at p. 268, the Court stated that MCL 691.1408 was "discretionary in nature and permits rather than mandates a township board to either hire a township attorney to represent the township entity as a whole or to pay for, engage, or furnish the services of an attorney." Even the ***Bowens*** Court found that "[i]t is within the discretionary power of a municipality to indemnify one of its officers against liability incurred by reason of any act done by him while in the bonified discharge of his official duties." ***Bowens***, *supra* at 418-419.

MCL 691.1408(3), clearly states that, "this section **shall** not impose any liability on a governmental agency." (emphasis added) (See Exhibit D) This is the only portion of this statute that is mandatory and not discretionary. However, both the Trial Court and Court of Appeals have failed to even acknowledge this important section of the statute.

Despite the clear and unambiguous language of the statute, the Court of Appeals has indeed imposed liability on the City of Flushing and all governmental agencies by perpetuating the "necessity" or "emergency" doctrine in ***Exeter*** and ***Bowens***, *supra*. The Court of Appeals in

this case, relying on both ***Bowens*** and ***Exeter***, *supra*, stated that those cases "held that the successful defense of a public officer from criminal charges represented a sufficient emergency and public concern to require reimbursement of the innocent official's attorney fees." (emphasis added) (See Exhibit E, p. 3) Applying that reasoning to this statute, it is no longer discretionary, because one can require reimbursement. After all, the "emergency" arises when the public officer is charged with a crime. Even though the language used by the Legislature leaves this decision up to the municipality, one can but commit a crime in the course of employment and be entitled to have their attorney fees paid. If the Court of Appeals' decision is allowed to stand, a municipality will be **required** to pay an acquitted officer's legal fees - failure to do so is an abuse of discretion.

Clearly, the Legislature never intended to create this "emergency/necessity" provision under the statute. It is plainly and unambiguously written as a discretionary statute that imposes no liability on the municipality. Yet, the Court of Appeals has imposed significant liability upon every governmental agency by requiring the reimbursement of attorney fees.

II. THE TRIAL COURT AND COURT OF APPEALS ERRED IN FINDING THAT THE CITY OF FLUSHING ABUSED ITS DISCRETION CONTRARY TO MICHIGAN CASE LAW

A. Standard of Review

A reviewing Court must reverse a Trial Court's findings of fact when they are clearly erroneous. ***Sands Appliance Services v. Wilson***, 463 Mich. 231, 238 (2000). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***Tuttle v. Department of State Highways***, 397 Mich. 44, 46 (1976).

B. Abuse of Discretion

Both the Trial Court and Court of Appeals, without analysis of the City's basis for its decision, have held that the City abused its discretion when it declined to reimburse Plaintiff for his criminal legal expenses contrary to Michigan statutory law. According to this Court, an abuse of discretion can only be found when the decision is so "palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." ***Dacon v. Transue***, 441 Mich. 315, 329 (1992). The Trial Court did not follow these standards when it found that the City abused its discretion. The Trial Court simply disagreed with the City's decision. Disagreeing is not enough to find an abuse of discretion under this Court's standard. Yet, the Court of Appeals created a whole different standard whereby a City can abuse its discretion even without "unprincipled passion or bias that lacks foundation in both fact and logic." ***Dacon***, *supra*. As stated earlier, the Court of Appeals created an abuse of discretion where a municipality refuses reimbursement of legal expenses incurred under a "necessity or emergency" doctrine. ***Exeter***, *supra* at 269-270. This emergency doctrine suggests that a City

can abuse its discretion even if there are perfectly logical reasons for its decision not to reimburse the employee. That erroneous standard was created in spite of the plain language of the statute making the decision discretionary!

The City's decision was a proper exercise of discretion because they had reason to believe that Plaintiff's activities, which led to criminal prosecution, were not performed as an employee and were not done within the scope of his employment. Additionally, they determined that Plaintiff's actions which lead to the prosecution were not performed in good faith and hence did not advance a public practice or procedure of reimbursing public officials. Even Judge Jansen in her lengthy dissent in this matter stated "there is a minuscule amount of evidence, if any, to support that Plaintiff was within his scope of employment as a Flushing Police Officer, and I am left with a definite and firm conviction that a mistake has been committed." (Exhibit E, Judge Jansen dissent at p. 2) This employment basis was one of the main reasons for denying the attorney fees. (See Resolution 1 and 2 giving basis for the denial by the City)

The City properly exercised its discretion. At no time did the Plaintiff ever demand a reasonable amount to be paid by the City. Additionally, the City, like Judge Jansen, found no evidence that Plaintiff was acting within the scope of his employment at the time of the inspection in question. As a result, the City's decision was not based on passion or bias but the exercise of reason and, therefore, could not be an abuse of discretion.

III. THE TRIAL COURT AND COURT OF APPEALS WERE INCORRECT WHEN THEY FOUND THAT PLAINTIFF CONDUCTED THE MARCH 2, 1992 SALVAGE VEHICLE INSPECTION WHILE IN THE COURSE OF HIS EMPLOYMENT WITH DEFENDANTS.

A. Standard of Review

A reviewing Court must reverse a Trial Court's findings of fact when they are clearly erroneous. ***Sands Appliance Services v. Wilson***, 463 Mich. 231, 238 (2000). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***Tuttle v. Department of State Highways***, 397 Mich. 44, 46 (1976).

B. The Trial Court's Findings of Facts Were Clearly Erroneous

MCL 691.1408 states that in order for Plaintiff to seek reimbursement for his attorney fees the alleged criminal acts must have been performed within the course of his employment. A person is not acting within the course of his employment at all times and for all purposes, but only when he acts "in furtherance of the employer's purpose" during a time related to his employment and in places "not unreasonably distant from" the employer. ***Backus v. Kauffman***, 238 Mich. App. 402, 408 (1999) (text and footnotes). The testimony was clear that Plaintiff's actions, with regards to these particular inspections, were not in furtherance of any purpose for the City of Flushing. Also, these inspections were performed in Macomb County, nowhere near the City of Flushing. No facts suggest that Plaintiff was acting within the scope of his employment with the City of Flushing. ***Backus***, *supra* at 409-410, i.e., activities carrying out the employer's business.

Furthermore, the overwhelming weight of the testimony suggests that it has never been a policy of the City to consider the salvage vehicle inspections as a part of the police officer's employment. In his Opinion, the Trial Judge found that Plaintiff was within the course of his

employment with Defendant City because he was encouraged by a previous police chief, his training was paid for by the City, he used City stationary, and the fees for inspections were paid to the City. The Court ignored the fact that there was no testimony stating the City benefited in any way from these payments or inspections and all fees were transferred to Defendant after taxes were taken out. (Exhibit C, p. 6) The Trial Court's finding was clearly erroneous.

The testimony was that the City did not keep any portion of the fees for the inspections. (TT Vol. I, p. 84) In fact, these fees were separated from the rest of the payroll. (TT Vol. I, p. 79) The Plaintiff testified that he was not in uniform and he used his own vehicle, deducting the mileage from his personal taxes. (TT Vol. I, p. 91) Additionally, no one kept tabs on the stationery or office supplies and the chief certainly wasn't aware that the Plaintiff was using such things. (TT Vol. II, p. 81, 87) Plaintiff was never encouraged by then Chief of Police, Faye Peek, to continue the inspections and they were considered side jobs for the officers, according to the City. (TT Vol. II, p. 37)

Officer Ward, testifying on behalf of the City, explained to the trial court that he has never conducted an inspection in Flushing and that the job has nothing to do with the City of Flushing. (TT Vol. II, p. 59) His testimony was that, as a salvage vehicle inspector, he was working for the Secretary of State, not the City. (TT Vol. II, p. 60) Finally, he testified that the City had no benefit from these inspections. (TT Vol. II, p. 60)

The governmental liability statute, under which Plaintiff brings this claim, requires that, at the very least, the "officer had a reasonable basis for believing that he was acting within the scope of his authority at the time of the alleged conduct." MCL 691.1408(2). However, Plaintiff admitted in his testimony that the inspections were moonlighting and supplementary income when he was off duty. (TT Vol. I, p. 89)

Furthermore, he admitted that he handled the inspection in question incorrectly by assuming repairs were made or to be completed. (TT Vol. I, p. 106) Under the salvage vehicle inspection statute, making false statements of material fact in a certification is a violation of the statute, this is certainly not within the scope of an inspector's, or officer's, authority. After the state police detectives became aware of the false report, the Plaintiff was interviewed and admitted to incorrectly filling out the inspection form. At trial the Plaintiff testified:

Q. And you signed a statement that they wrote out, did you not?

A. Yes, I did.

Q. And one of the questions that you were asked was did you certify that the vehicle was complete. Do you recall the questions on that form?

A. Yes, sir, I do.

Q. And you answered, "Yes, I did"?

A. Yes, I did.

Q. And another question was, why did you do this, do you recall that?

A. Yes, Sir.

Q. And you're answer was, "I made a mistake and I believed the total repairs were to be completed," true? (emphasis added).

A. That's what it says.

Q. And you signed that form?

A. Yes, Sir, I did.

(TT Vol. I, p. 106)

Falsifying statements is a clear violation of the salvage vehicle inspection statute. Yet, the Plaintiff claims that he was acting as a Flushing police officer at that time. (Knowing this was necessary to collect attorney fee reimbursement.) Not only did his actions violate the

inspection laws, they also violated the rules of the Flushing Police Department. Those rules were discussed by Chief Peek at trial and are as follows:

> The first one is a violation of Law Enforcement Code of Ethics. The second, is the violation of duties, and responsibilities, at the Department of Organization. The third deals with communications and correspondence. The fourth deals with the personal conduct. The fifth, is performance duty. And sixth, the sixth is the actual City of Flushing rules and regulations to deal with misconduct and lying. (TT Vol. II, p. 29)

Some examples of these violations include, lying to the Chief and violating Michigan statutes. (TT Vol. II, p. 30 and 31)

Judge Jansen's dissent was also based on the fact that Plaintiff was not in the course of his employment as a Flushing police officer. After a thorough review of this case, Judge Jansen wrote:

> "I am convinced that the trial court erred because plaintiff's service as a salvage vehicle inspector was clearly not in his course of employment as a Flushing police officer and there was no reasonable basis for him to believe he was acting within scope of his authority as a Flushing police officer as he acknowledged that he was "moonlighting" while off duty for "supplementary income." And, reviewing the trial court's findings under an economic reality test, there is a minuscule amount of evidence, if any, to support that plaintiff was within his scope of employment as a Flushing police officer, and I am left with a definite and firm conviction that a mistake has been committed."

In conclusion, the Trial Court's findings were clearly erroneous when it determined that Plaintiff was within the scope of his employment for the City of Flushing, while he was conducting salvage vehicle inspections for the Secretary of State. Two other police officers refuted all of Plaintiff's rationale for claiming he was a City employee. Both Chief Peek and Officer Ward testified that the inspectors were employed by the Secretary of State and that the City never encouraged these inspections, nor did it receive any benefit from them. Even if the officer alleged he had a good faith basis to believe his duties as a salvage vehicle inspector were

part of this duties as a Flushing police officer, he admitted that his actions were a violation of the salvage vehicle inspection statute. Therefore, his actions were outside the scope of his employment.

In light of the foregoing, it cannot reasonably be said that factually or legally Plaintiff was an employee of the City of Flushing. Plaintiff could not have reasonably believed he was acting within the scope of his authority when he falsified records. Both city employment and a reasonable basis for believing he was acting within the scope of his authority, are requirements that must be met for Plaintiff to request that his attorney fees be paid. (TT Vol. I, p. 106) See MCL 691.1408(2).

CONCLUSION

The Trial Court and the Court of Appeals misinterpreted the plain language of MCL 691.1408(2) and created a necessity or emergency exception that took away the City's discretion required a municipal corporation to reimburse its' employee for legal services. Those Rulings are contrary to Michigan law. If a statute is not ambiguous, it is clear that the Courts are to presume that the Legislature intended the meaning that was clearly expressed and no further judicial instruction is required or permitted. See ***DiBenedetto,*** *supra.* The Court of Appeals disregard this precedent and changed the entire meaning of the statute from discretionary to mandatory. That same statute, at subsection 3, clearly states that the statute shall not impose any liability on a governmental agency. MCL 691.11408(3). Now, the Court of Appeals has imposed significant liability upon every governmental agency by requiring reimbursement of attorney fees. The statute should be read and enforced as it is written, without the "emergency" provision. This statute was written with the intention of leaving reimbursement of employee legal services within the discretion of the governmental agency. That discretion has been taken away by the Court of Appeals and must be returned.

The City properly exercised its discretion when it declined to reimburse Plaintiff for his criminal legal expenses. After significant discussion and analysis of the Plaintiff's actions, the City, by Resolution, laid out in great detail, the reasons for denying Plaintiff's attorney fees. The City's decision was not based on perversity of will or bias, but the exercise of reason. Therefore, according to this Court's definition, the City could not have abused its discretion.

Finally, the Trial Court and Court of Appeals finding that the Plaintiff was in the course of his employment by the City at the time of the salvage vehicle inspection for the Michigan Secretary of State was clearly erroneous. As Judge Jansen correctly noted, there was really no

evidence that would suggest that Plaintiff was within the scope of his employment as a Flushing police officer at that time. Even the Plaintiff used the word "moonlighting" to describe his position as a salvage vehicle inspector. According to testimony, the salvage vehicle inspector is employed by the Secretary of State and the City never encouraged these inspections. Furthermore, the City never received any benefit from these inspections (despite the Ruling of the Trial Court and Court of Appeals.) Even assuming that the Plaintiff had a good faith basis to believe his duties as salvage vehicle inspector were part of his duties as a Flushing police officer, the actions that he took leading to his criminal prosecutions were admittedly unlawful and outside the scope of his employment. Therefore, it can not reasonably be determined, factually or legally, that Plaintiff was an employee of the City of Flushing at the time of the salvage vehicle inspection. As such, he would not be entitled to reimbursement for the attorney fees in any interpretation of MCL 691.1408(2).

RELIEF REQUESTED

Defendants/Appellants pray that they be granted leave to appeal from an unpublished opinion of the Michigan Court of Appeals dated December, 2003, an Order of the Trial Court dated December 23, 2003, and the decision of the Trial Court entered November 5, 2001, awarding Plaintiff attorney fees in the amount of $109,200.00.

Defendants/Appellants ask that this Court reverse the decision of the Court of Appeals and the Trial Court.

Respectfully Submitted,

HENNEKE, McKONE, FRAIM & DAWES, P.C.

Dated: Feb. 2, 2004

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